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ABSTRACT

A suit was filed in 1972 in California by an 18 year old high school graduate who asserted that he remained functionally illiterate after 13 years of regular attendance in the San Francisco public schools. Claiming personal injury as a consequence of the failure of school professionals to exercise reasonable care in the discharge of their duties, he asked the court to hold the school district liable to him for damages in excess of $500,000. This suit reflects the relationship between educational accountability and educational outcomes. School negligence is difficult to demonstrate because of the underlying dilemma as to what evidence is relevant, reliable, and credible. One solution to this dilemma requires that procedures be adopted and modified which rely more on human testimony than other evaluation approaches. The forum for carrying out such a procedure is called an educational hearing, and it may provide a more effective way of adequately seeking balanced factual data, while not replacing existing designs for the collection and analysis of evaluational evidence. (Author/BJG)

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Evidence: Educational Evaluation and the Metaphors of Law*

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Several years ago Stuart Sandow, then of the Educational Policy Research Center at Syracuse University, warned that it wouldn't be too long before students and parents would be suing the public schools for fraud (Sandow, 1970). Shortly thereafter, Gary Saretsky and Jim Mecklenburger in a provocative article in the Saturday Review (October, 1972) suggested that public education, as the nation's largest consumer industry, could easily become the next target in the rising trend of consumer militancy. It was proposed that students, parents, and tax-payers could well claim that the principles of law that govern business, industry, and some professions extend to education. Issues such as malpractice arising from negligence, or violations of implied contracts could well place teachers, administrators, and school board members before the courts as party defendants to class or individual action on the part of the citizenry.

The prophecy has been realized. Running on the heels of the nationwide educational accountability movement, a suit was filed in 1972 in California by an 18 year old high school graduate, alias, Peter Doe, who asserted that he remained functionally illiterate after 13 years of regular attendance in the San Francisco public schools(Saretsky, 1973, Abel, 1973). Claiming personal

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injury as a consequence of the failure of school professionals to exercise reasonable care in the discharge of their duties to provide instruction, proper evaluation, and counseling, Doe asked the court to hold the school district liable to him for damages in excess of $500,000. The case is currently on appeal in the California appellate courts.

We know that the courts, in the past, have provided substantial determiniation of public school policy. The constitutional provisions of free speech, free press, right to assembly, due process, and equal protection have since the 1940's served as the bedrock for construction of four legal doctrines that affect every public school: non-discrimination, academic freedom, political accountability, and equality of opportunity.

While the decades of the fifties and sixties have solidified the idea of free and equal access to public schooling, the seventies and beyond may insure that the quality of instruction and educational opportunity, once the doors to the school house have been opened, will be vastly improved and maintained. The new accountability legislation manifests a shift in emphasis from access to education to affixing responsibilities for educational outcomes--it implies criteria for supporting socio-educational programs as well as judging their effectiveness.

EVIDENCE PROBLEMS IN EDUCATION

But presenting proof, as in the Doe Case, of poor quality of instruction, or establishing the negligent behavior of teachers, administrators, board members, and other school related personnel is no simple task. Likewise, demonstrating breach of implied contract between parent, student, and tax-payer with a school

and its officials presents a multitude of questions and problems. Even with the adoption of school accountability laws in many states, thereby transferring implied contracts into clear expressions of school responsibility regarding both the processes and products of instruction, the issues are complex and confounding.

The dilemma underlying these concerns is what sort of evidence do we have that is relevant, reliable, and credible, that provides good sound information on the quality of the instructional atmosphere and the sorts of learning that transpire? It should be noted that in instances of educational litigation such evidence must be of a character that it will stand up in a court of law, and enable those who judge that evidence to reach reasonable and informed decisions. In recent years the more traditional kind of evaluation evidence has been looked upon unfavorably by judges involved in educational litigation.

The problems of evidence to answer questions regarding the quality of schools and school programs is an important concern, irrespective of court cases like Peter Doe's. The judicial soundness of such evidence should merely provoke thought about the kind of evidence needed to guide decision making in education. Educational evaluators, as well as all those interested in judging the quality of educational endeavors, must be concerned with the kinds of evidence utilized to render such judgments.

This is particularly true since most of the decisions that presently affect educational practice are extra-judicial. Someone must decide what the responsibilities of the educational system shall be, to whom they will be delegated, and what will be the indicators of compliance. As stated, most cases of question as

to the fulfillment of responsibilities will not reach the courts. Parents, students, teachers, evaluation experts, state and federal officials will comprise the arena of contest.

And it is here that the dilemma is confounded. Evaluations of most socio-education programs are totally unresponsive to the needs of people who are involved in or affected by such programs. The methodologies that are typically employed are rooted in behavioral and social science research paradigms that rely on quantification and complex analysis. In the spirit of seeking objectivity those methodologies often ignore and exclude the most fundamental evidence we have available to us--human judgment.

In our everyday lives we trust our judgments. We believe that contrary to scientific rules of objectivity people are efficient and effective information processors. We respect human ability to collect, store, and use information, and make judgments based on that information in a solid way. How then is it that we allow schools to exclude human judgment as a significant source of evidence when decisions affecting our children's lives are issued based on test scores and other purportedly objective indicators? This is particularly tragic because the evidence that is used by schools is so limited in its scope, so restrictive in terms of the language needed to describe it, and so questionable in terms of its validity when one considers the broad aims of education and the evaluation of those aims.

A child's school environment consists of many elements ranging from children, their interactions, the materials employed, and the relationships with teachers that emerge. Test scores and other such data can give only fragmentary evidence of this environment.

Great collections of numbers (totals, averages, percentages) such as those found in children's cumulative files and school evaluation studies tend to blur and obscure rather than sharpen and illuminate the range of variation they hope to represent. Moreover, tests are only indirect measures. As Bob Stake suggests, they assess the correlates of learning rather than the learning act itself (Stake, 1973). If we are willing to accept this kind of circumstantial evidence, then we must be willing to accept a whole variety of other forms of evidence. In fact, new procedures must be developed for processing and displaying such evidence in order for it to have greater and more profound impact on educational decision making. It is essential that a broad evaluation perspective be brought to bear on this important task.

Within the past ten years educational evaluation has become increasingly utilized to provide information for analyzing alternatives and directing the decision making process. Additionally, there has been a growth of acceptable evidence to be used in evaluation studies to include both descriptive and judgmental data. Yet, in most instances the information provided has not been sufficient to totally meet this increased decision making responsibility. Judgments are often based on less than complete evidence. Seldom is a free inquiry into all aspects of the potential alternatives made prior to issuing a decision. This is particularly tragic in times of public and professional concern for accountability and responsiveness. What will happen, and has happened in cases like the Peter Doe example, is that educators will be called upon increasingly to justify the evidence used in

making such decisions as to how they have tracked a child, why they have passed or failed a child, on what grounds they have certified a teacher, what led them to think a particular program was achieving the desired objectives and so on. At present, some educational administrators and educational evaluators are searching for more systematic fact-finding processes.

UTILIZING LEGAL METAPHORS

One such process is the judicial evaluation approach (Wolf, 1973, 1974, 1975 a, b) which adapts and modifies certain concepts from both jury trials and administrative hearings in the field of law. Several evaluation methodologies have advocated using adversary proceedings over the past few years, but have done so without careful analysis of the rationale and concepts underlying and comprising such proceedings. Unfortunately, in some instances adversary proceedings have been used more as gimmicks than as anything else.

The most salient and compelling reason for using the law as an informing paradigm is that it offers an extraordinary system of evidentiary rules and procedures aimed at producing alternative inferences from data prior to the rendering of sound judgment. In adapting and modifying certain procedures evaluators can develop a clear set of issues upon which to focus the inquiry, rely more on human testimony than other evaluation approaches do, present a balanced view of the evidence by employing two evaluation teams exploring the different sides of the issues, and finally, structure the deliberations of the decision making group. The forum for carrying out such procedures is what I am calling an educational hearing. The hearing is not intended to

totally replace existing designs for the collection and analysis of evaluation evidence, but rather to provide a more effective way of adequately seeking and presenting balanced factual data. Currently, many of the assumptions, rationales, methods of data collection and analyses of evaluation reports are allowed to pass unchallenged. The judicial approach provides for the structured consideration of alternative arguments and inferences to keep the evaluation both intellectually honest and fair. Unlike true adversary proceedings in the law where the object is to presumably win, educational hearings are aimed at producing broad program understanding, exploring the complexity of educational issues, and keeping at least two sides of the truth alive.

Elsewhere (Wolf, 1973) I have carefully explicated precisely what judicial procedures appear to be most relevant to educational evaluation. This discussion also pointed out the constraints and limitations in using such procedures, as well as pointing out the practical problems of those concepts within their legal context.

In essence the legal paradigm has evolved procedures for evaluating arguments and the evidence used to substantiate such arguments. The courts have developed methods for dealing with whole human events in social and historical contexts. Although these methods have imperfections, they permit flexible treatment of a great variety of issues and forms of evidence. There are methods of proceedings which permit advocates to prepare persuasive arguments of the issues in question, and to contest those decisions before a group of decision makers who will render a judgment based on the evidence presented. Also, in a court of law, the

methods for evaluating evidence and the presentation of evidence occur simultaneously. These procedures are explained at the same time the jury is asked to judge the evidence and render a decision. Criticism of the presentation of data also occurs before the eyes of the jury and, in part, accounts for their final decision. Consider how these procedures contrast sharply with the final report strategy employed by many educational evaluators.

Additionally a court of law is an arena in which beliefs are contested. Procedural law determines what the rules of inquiry are and how the court will go about determining what is reasonable to believe. Judicial discussions are arguments in support of retaining a given set of facts. Moreover, they reflect a concern for consistency with past decisions as well as concern for the future. The study of a line of precedent is the study of a belief system. The law is an advisory system which does not compromise but rather presents statements of opposing positions--each supported by legal and policy arguments. The contest of these opposing positions centers around the act of fact finding, which appears to be among the most significant activities in contentious litigation.

Fact finding involves the actions of both parties in a law suit as each seeks out all of the relevant facts that bear on the compliance with or violation of a legal rule or standard. This fact finding missions in a sense, reconstructs events that have occurred so that an understanding can be achieved and a decision rendered. The facts do not walk into court. The court usually learns about these real, objective past facts through the

oral testimony of fallible witnesses, and bits of circumstantial evidence. Accordingly, the court, from learning such evidence, must conjecture the actual past facts. Judicially, the facts consist of the reaction of the judge or jury to the presentation of the evidence. The evidentiary facts are merely guesses about the actual facts. There can be no assurance that the evidentiary facts are the actual past facts. Rules of evidence help to clarify and control the potential error.

These rules have developed over centuries of common law primarily to protect the naivete of lay jurors and aid them in their decision making function. Additionally, rules of classifying and weighing evidence have also evolved so as to enhance the judgment process. The legal system for classifying evidence is an intricate one.

Within this classification system there is an important distinction between testimonial and circumstantial evidence. Testimonial evidence can be either direct or indirect, but it always relies on the oral testimony of competent witnesses. This oral testimony, or assertion, is offered to evidence the truth of the matter asserted. It can be offered as direct evidence or as indirect evidence from which an inference may be drawn. Circumstantial evidence is any or all other evidence that could be defined as nontestimonial.

The distinction between circumstantial and testimonial evidence is both sound and practical. The reason is that all testimony, whether offered as direct or indirect evidence, has certain common qualities, and rules can be generalized for these qualities. Thus, all witnesses may have mental aberrations,

must have opportunities for knowledge, and must use words or symbols to express themselves. All witnesses are also open to question as to bias, honesty, recollection, and so on. Circumstantial evidence, on the other hand, is of an infinite variety and has no common basis of inference.

In addition to rules of classification, there are also rules for determining the admissibility of evidence, and weighing it accordingly. In general, these rules are based upon both the relevancy of the evidence and upon practical policy. For instance, certain evidence may be extremely relevant to the issue at hand but it may be overly prejudicial or hearsay testimony, etc. Despite the relevancy then it may be excluded on other grounds.

Currently, most of the evidence we gather in evaluation efforts (human testimony notwithstanding) is circumstantial. Test scores, attitudinal measures, survey protocol data, and a variety of unobtrusive measures are displayed so that inferences may be drawn. Presenting such evidence as direct proof of the quality or worth of educational programs is extremely misleading, and as stated earlier, even the courts are highly suspicious of this kind of practice. We need to rely on human testimony as direct evidence and all these other evidentiary sources as merely corroborative of those human assertions.

An educational hearing employing some of the rules and procedures discussed above, modified of course to better suit educational needs, would be an interesting alternative to the way evaluation data is typically presented. Cross-examination procedures could also be utilized so that the validity and reliability of the evidence could be ascertained and alternative

inferences offered. Unlike a trial proceeding, however, it would not be the purpose here to sway by coercion or emotional rhetoric for that defeats the intent of the information session. Rather it would be to draw out of the witnesses the salient meanings of the educational program under consideration, its costs and the benefits it hopes to produce that redress certain missing services or redirect the energies of the school. And since the courts' mode of inquiry is educative, the decision making group would be instructed how to use the evidence, weigh it accordingly, and render sound judgments based on its presentation.

TOWARD METHODOLOGICAL IMPACT

Obviously, employing such mechanisms in the course of doing evluation would not be easily achieved. Rules of evidence, procedures for inquiry, and even an examination and testing out of those educational policy areas that do not lend themselves to such procedures need to be identified.

But the process appears to be working in Bloomington, Indiana. I have been working there to set up an educational hearing of a broad scale teacher education program. Issues have been identified upon which the inquiry will focus, adversary evaluation teams have been building their respective arguments for and against the program, witnesses have been deposed, strategies for cross-examination, judicial instructions, rules of evidence, jury selection, deliberation procedures, and pre-hearing discovery have been designed and are all in process (Wolf, 1975 b: Wolf, Farr, and Mintz, 1975). The implementation problems are difficult to resolve, but at least, in my judgment, it is a move forward.

In sum, the courts' mode of inquiry offers a hopeful mechanism to arrive at sound judgment. I am continuously impressed with the elegance of the common law's reliance on human judgment--it is for me a powerful metaphor from which to borrow and learn. To use human testimony as evidence, to employ cross-examination procedures, and to pass judgment after careful deliberation is a profoundly meaningful process. It is my judgment that the system of justice in the United States can best offer paradigms, theories, and procedures that could affect the issues that bear on the lives of students, in much the same way that the Doe case can. It is in the realm of legal methodology that the law can also have a great impact on shaping educational policy and practice.

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